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Greece after the Memoranda: A Constitutional Retrospective

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Anna Tsiftoglou*

ABSTRACT

Can financial crises bring constitutional change? Has Greece become a prominent example? Over eight years into recession and having undergone several programmes of fiscal adjustment, Greece is gradually experiencing an institutional change. This change, which takes place informally rather than formally, is affecting state institutions, primarily its parliament, as well as the executive and the courts. Everyday practice, political or otherwise, has changed the norms, vital checks and balances and has brought about a new ethos to our Constitution. With this paper, I aim to explore the idea of constitutional change and to connect it primarily to parliamentary and judicial activity after the Memoranda. How have state institutions reacted to the crisis? How do external players interplay with local institutions and interests? Will this crisis have a longer-term impact on the country, beyond its economic recovery?

Keywords:

Constitutional change; financial crisis; Greece; institutions; new norms

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1. Introduction

Can financial crises bring change? Has Greece become a prominent example? Were one to describe what the country has been going through over the past crisis years, one would need to resort to the language of constitutional law, particularly to the notion of *constitutional change*. The latter term, when applied in the financial crisis context, could help us see the dynamic relationship between crises and constitutions. In the Greek case, constitutional change could aid us navigate the impact of the crisis on core state institutions. For the purposes of this paper, the scope of our study will be limited primarily to national parliaments and courts, particularly to see whether and how the financial crisis since the 2010 bailout programme to present has distorted their function and role in the crisis-hit state. And vice-versa, how they have reacted themselves to the crisis and the challenges posed.

We should keep in mind, though, one thing. Institutional deterioration had predated the debt crisis in Greece. In fact, it may have even caused it. Thus, a critical question to ask is whether the debt crisis was *the cause* or *the trigger* of constitutional change in Greece.

2. Constitutional change and the Case of Greece

Constitutions may change in two ways, formally and informally. Formal or *de jure* change happens through the revision process, while informal or *de facto* change may take place through the practice of a variety of players. Formal constitutional change may be a long and hard process, depending on the rigidity of the constitution and the political context. Constitutional rigidity may help constitutions last longer but it may also present obstacles to the adaptability of a constitution, especially during crises. On the other hand, *de facto* constitutional change may take place drastically, with the interplay of multiple factors.

In fact, a number of factors have been cited in literature (Oliver and Fusaro (2011) as the principal drivers of constitutional change: *the people, the courts, governments & their leaders* and *supra-national institutions*. Therefore, constitutional change, be it formal or informal, may be the result of acts of parliaments (laws), courts (case-law), the executive or the people directly (referenda). Additionally, external factors or players, besides internal ones, may drive this change. Supranational or even *ad hoc* institutions, acting beyond the state, may influence the language and development of constitutions.

The Greek case, thus, should be examined in this framework. Constitutional change, its type, scale and frequency could be attributed to both the character of the constitution and the variety of players influencing it (Smith 2003). Due to its rigidity (Contiades and Tassopoulos 2013b), the Greek constitution has been formally revised² only three times during the past forty five years of the *metapolitefsi* era since 1974, the post-junta period that signified transition and sweeping reform of Greek political institutions (Kalyvas 2015), with the process of a fourth revision recently initiated, in February 2019. Moreover, the country's European Union (EU) accession in the early 1980s has brought

² See article 110 of the Greek Constitution, concerning the amendment procedure. In addition to qualified majorities, the Constitution sets a strict 5-year time limit before its next revision.

a *de jure* constitutional change, with the steady influence of EU legislation and case law on the Greek legal order³. In a ‘shared sovereignty’ era (Tsoukalis 2016; Loughlin 2017), the EU institutions have been significant players ever since the country’s EU accession in the early 1980s. Besides, during the Greek sovereign debt crisis, ad-hoc institutions like *the troika*, namely the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) and, recently, the European Stability Mechanism (ESM) have led the drafting, negotiation and supervision of all Greek bailout programmes.

Given this novel institutional mix, I argue that a *de facto* change of the Hellenic constitution may have taken place under the pressure of economic emergency and the development of new decision-making dynamics within the crisis-hit state. Both external and internal players have been the drivers of this change. The crisis seems to have *magnified* pre-existing dynamics in legislative and judicial activity. In this sense, the crisis could be seen as a series of transformative ‘constitutional moments’ (Ackerman, 1998), which have changed the interpretation, the application and normativity of the constitution.

We shall attempt to see how the internal drivers of this change – being the parliament, the courts and the people- have reacted under the pressure of economic emergency, and what their actions, seen within the timeframe of nearly a decade of bailouts, may signify. Rather than offering an exhaustive account of the legislation or the case law of the crisis period, this paper aims to highlight trends born during this period, systematising them, if possible, and seeking answers for them. Has the crisis been the cause or merely the trigger of this change? Has this change been more permanent than temporary? In what sense?

3. Triggering Change: The Memoranda of Understanding

Greece’s record of institutional weaknesses had been well-known. In 2009, Greece suffered from a severe combination of two kinds of crises: sovereign debt and a large budget deficit. In 2010, the year of its first bail-out, Greek public debt amounted to 145% of its GDP, only to rise to over 180% of its GDP within seven years⁴. Several erroneous policies of the past and the state’s persistent failure or resistance to modernize (Tsoukalis 2016; Pelagides & Mitsopoulos 2016) contributed to reaching that critical point. Greece thus had to resort, like other countries of the Eurozone periphery, to external funding for its needs. Without *early* debt restructuring – the ‘original sin’ of the crisis (Orphanides 2015) and a sign of the IMF’s submission to European pressures (Blustein 2016)- and assuming the costs of delaying it (Xafa 2014), Greek public debt has become literally unsustainable (Zettelmeyer 2017; Raffer 2017). Moreover, the country’s recovery and return to growth remains uncertain (Pagoulatos 2018), despite its recent ‘exit’ from its third financial assistance programme in August 2018. As well

³ See article 28.3 of the Greek Constitution, which provides the constitutional foundation for the participation of the country in the European integration process.

⁴ Source: Eurostat (last updated October 26, 2017)

pointed out (Xafa 2018), a mere succession of bailouts, without significant regulatory, judiciary and tax reform progress, and in defiance of any optimistic projections, has turned out not to be the pill for Greece's chronic illnesses.

To overcome its financial hardship, Greece requested financial assistance in the form of bailouts. During 2010-2018, Greece underwent three consecutive economic adjustment programmes, signing three Memoranda of Understanding ('MoUs')⁵ with its creditors (EC/ECB/IMF) ('the Troika') and the ESM, in exchange of loans of over €300 billion in total. All loan agreements were *conditional* on the implementation of reforms and austerity measures. However, the conditionality imposed was often unrealistic in terms of targets and time frames. Each programme turned out more realistic than its predecessor (Pagoulatos 2018).

External conditionality has been hailed as a 'mega policy instrument' (Spanou 2016). Empirically speaking, conditionality has one significant political advantage: governments from any side of the political spectrum have made use of the external force as a scapegoat to pass rather unpopular measures that would have otherwise been unthinkable (Moury and Standing 2017, Pagoulatos 2013). The reform capacity of policy conditionality *per se* is debatable, though. Domestic dynamics, namely the political system, governance processes and its deficiencies, are crucial for the successful implementation of external policy change (Spanou 2016). Without focus and prioritisation, external conditionality may fail in its domestic implementation. While the MoUs have been a major catalyst for policy change, the Greek society, for numerous historical reasons and contrary to what the elites supported, has been to a certain extent resistant to externally imposed reform- even more so, to 'Europeanisation' (Tsoukalis 2016; Dertilis 2018). The very process of internationalisation and Europeanisation of the Greek state has never been straightforward or completed, after all (Ioannidis and Koutnatzis 2017). After years of accumulated sins and sovereign debt, Greece has entered a long period of *forced* adjustment through successive bailout programmes, the long-term impact of which still remains rather uncertain.

The question is how three main players, namely the parliament, the courts and the Greek people, have responded to the MoUs, how they treated externally imposed change, and, ultimately, whether their reactions were well justified, drastic and even long-term.

4. Three Drivers of Constitutional Change in Crisis-hit Greece

4.1 The Parliament: Parliamentary Distortions after the Memoranda

Greece's entry into the period of fiscal adjustment, the so-called 'Memoranda era' signified a new reality for the country. All three Memoranda of Understanding shared

⁵ Specifically, in May 2010, October 2011 and August 2015, for the loan of €110 billion, €130 billion and €85 billion respectively. See https://en.wikipedia.org/wiki/European_debt_crisis (last visited July 4, 2018)

the same legal status. While their nature had been widely disputed, both nationally⁶ and internationally⁷, in Greece they were considered political ('soft law') not international agreements drafted essentially by the creditors -at least on their conditionality part- with the Greek government playing only a limited role (Papaconstantinou 2017). Due to their 'soft –non-legally binding- law' nature, the MoUs did not have to be ratified by the Greek Parliament with qualified majorities of 3/5 (180 out 300 MPs) as provided by article 28.2 of the Greek Constitution. All Memoranda were initially decided on a multilateral basis between Greece and its creditors, and were later incorporated into Council Decisions obliging Greece to implement several austerity measures⁸ through national legislation⁹. Hence it was only the measures implementing the MoUs, through national legislation, not the MoUs per se, as political agreements, which could be judicially reviewed.

This new wave of 'austerity legislation' also sparked a novel parliamentary practice. Given their legal status as soft law agreements, the MoUs did not require ratification with qualified majorities -as international agreements do under the Greek Constitution- but could be embedded into the national legal order with very little democratic deliberation. While retaining the power to propose bills, the Greek government was mandated to find ways to implement the commitments made in the MoUs, under the final approval of the Troika¹⁰. Thus, the Greek parliament gradually acquired a more or less ratifying or executive role. Even before the crisis, though, parliaments had increasingly become marginalised (Papadopoulos 2013). That should have been expected, though, since nowadays state power is steadily diffused to spheres beyond the state, national or supranational, including to private bodies (Napolitano 2013). These trends were merely magnified during the crisis, through the exaggeration and steady legislative abuse of emergency (Venizelos 2018).

Economic emergency has had a major impact on regulation. Legislating gradually became an act of survival, losing its value and significance. The steady resort to emergency legislative procedures dictated choices regularly divesting the parliament of valuable time for discussion. While originally a forum of deliberation, and despite its operational issues that predated the crisis, the parliament's mission was altered to satisfy troika demands and impossible deadlines. Emergency legislative procedures

⁶ See the seminal decision of the Council of State, Decision 668/2012 (plenary session) (concerning the constitutionality of measures of Law 3845/2010 implementing the First Memorandum in Greece). However, a minority of the court supported the view that the MoU was an international agreement (§§27-8).

⁷ See the recent landmark *Florescu* case, where the Court of Justice of the EU (CJEU) for the first time acknowledged the legal status of the MoUs as 'acts of EU institutions', Case C-258/14, *Eugenia Florescu and Others v. Casa Judet*, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448.

⁸ See eg, Council Decisions 2010/320/EU, [2010] OJ L 145/6 and 2015/1411/EU, [2015] OJ L 219/12

⁹ See eg, Law 3845/2010 on Mechanisms to implement the support of the Greek Economy from the Eurozone members and the IMF (1st MoU), Law 4046/2012 on the approval of the draft convention of economic assistance between the EFSF, the Hellenic Republic and the Bank of Greece (2nd MoU), Law 4336/2015 (3rd MoU) on pension provisions and the Ratification of the Draft Agreement on the Financial Assistance by the European Stability Mechanism (E.S.M) regarding the implementation of the Financing Agreement

¹⁰ Papaconstantinou G., Interview, id ('in practice, we may have had the pen to draft bills but lacked discretion. As the time went by, distrust grew bigger- the Troika often asked us to see draft bills in advance')

slowly became the norm rather than the exception, often for reasons of political expediency, to ensure compliance with political commitments made. Consequently, the very procedure of legislating the Memoranda turned gradually into ‘a vote of confidence for the Government’ (Papaconstantinou 2017). Parliamentary voting of memoranda bills, as rapid as it was, signaled an endorsement both of the austerity programmes per se and of the government promoting them.

At the same time, the Parliament has systematically abused other procedures too. Firstly, the submission of various last-minute law amendments¹¹, which often surpassed in number the articles of a draft bill¹², or the fast-track procedure¹³, or voting hundreds of pages of bills drafted in a single article¹⁴, to easily pass measures that could not withstand parliamentary review. Moreover, another common practice developed during the crisis has been the adoption of multi-themed bills (πολυνομοσχέδια) that challenged the principle of specification of laws¹⁵, piling legislative material from multiple ministries into a single bill¹⁶.

In general, most –if not all— of the bills implementing the Memoranda were discussed and voted in an unorthodox fashion, in one sitting, often under conditions that tested human resilience (Gerontas 2010). Any disagreement with the measures often resulted in the MPs’ dismissal from their party¹⁷, raising further questions about internal party democracy in Greece. Moreover, the aforementioned legislative distortions, as well as any other errors within the legislative procedure, cannot be challenged at court in Greece, since they are considered *interna corporis* of the parliament, so not subject to judicial review.

The finest other example of parliamentary distortions during the crisis is the phenomenal rise of legislative decrees (πράξεις νομοθετικού περιεχομένου). By abusing an exceptional clause (Article 44.1 of the Greek Constitution) that allows the executive power (the cabinet) to legislate only ‘under extraordinary circumstances of an urgent and unforeseeable need’, every government since 2010 has massively issued legislative decrees to legislate anything, from emergency measures to law amendments (Gerapetritis 2012a). During the first seven years of the crisis, decrees have been generally multiplied over five times, with the latest coalition government hailed the champions (Sotiropoulos and Christopoulos 2017). Since legislative decrees are considered special laws, once ratified by the parliament, they formally have equal status with the laws issued by the parliament, while they are issued much more easily.

Hence the resort to legislative decrees was not random. The clear advantage behind the legislative decrees was that the executive could bypass ordinary ‘lengthy’ procedures and the parliament with ‘fast track’ legislation often without satisfying the emergency

¹¹ See, eg, Νομοσχέδια εξπρές, άσχετες τροπολογίες στη σκιά της αβεβαιότητας, *Kathimerini*, June 2, 2017

¹² Article 74.5 of the Greek Constitution

¹³ Article 76.4 of the Greek Constitution

¹⁴ See, eg, Laws 3985/2012 and 4093/2012

¹⁵ Enshrined under Article 74.5 of the Greek Constitution

¹⁶ See, eg Laws 4320/2015 (A’29), 4350/2015 (A’161) and 4425/2016 (A’181).

¹⁷ See, eg the dismissal of 45 MPs by their respective party leaders after voting against their party lines favoring the 2nd MoU: ‘Yes to the Memorandum by 199 MPS, no by 74’, *To Vima*, February 12, 2012.

conditions. Since the latter is considered a political question not subject to judicial review¹⁸, the abuse of this practice has significantly empowered the executive, with the government discovering a leeway to act literally unbound. Using emergency as a pretext, every government has discovered a manner to legislate everything, beyond its commitments made under the memoranda, bypassing the parliament. Moreover, legislative decrees would only be ratified by the parliament within three months of their submission, having already produced their legal effects. Given the institutional imbalances caused by this abusive practice, there is an imperative need for judicial review, even limited, of legislative decrees. Notably, since this abusive practice undermines the normative power of the Constitution.

Much of the austerity legislation was passed through these emergency procedures. Such normalisation of exceptional procedures or the circumvention and/or distortion of fundamental rules of the legislative procedure, which was magnified during the crisis period, has had an adverse impact on the quality of legislation and has seriously distorted and devalued the Hellenic parliament's role within the established separation of powers system (Sotiropoulos and Christopoulos 2017; Papaconstantinou 2017)¹⁹. On the contrary, since state power often tends to flow towards the executive in emergencies (Scheppele 2010; Greene 2015) dynamics have tilted towards the government. Under strong troika pressures, it has been significantly empowered during the crisis, while left virtually unfettered from parliamentary controls. By abusing the notion of emergency, often for reasons of political expediency, governments have been hailed de facto as the ultimate decision-makers during the crisis years in Greece, regardless of the ruling party or coalition.

It is imperative thus to restore checks and balances in order to combat the establishment of a majoritarian parliamentary system that undermines state institutions and the normative power of the constitution on the long run. Expanding the scope of judicial review of constitutionality to the interna corporis of the parliament (Gerapetritis 2012b) might provide a good safeguard against parliamentary arbitrariness. The tough challenge for parliaments remains how to restore institutional dynamics to healthy levels, before the wave of 'parliamentary de-construction' in the crisis (Marketou 2017) becomes endemic.

4.2 The Courts: Judicial Asymmetries and Judicial Review during the Crisis

Courts, particularly the highest ones, have been important drivers of change during the crisis. The so-called 'crisis litigation' gave rise to a significant body of case law that challenged the constitutionality of a variety of austerity measures, notably in the fields of social and tax policy. As a result, a critical mass of political decisions borne by the three Memoranda was ultimately judicialised, a trend rather expected (Papadopoulos 2013), empowering justices, particularly of the highest courts, to exercise their vested

¹⁸ See, eg, Council of State (plenary session), Decision 2291/2015 (ruling that the satisfaction of emergency conditions under article 44.1 of the Constitution is 'a political question not subject to judicial review').

¹⁹ See, eg, a legislative decree (Government Gazette No. A'224/12.11.2012), published the same day as Law 4093/2012 implementing the Second MoU, which illegally modified the provisions of Law 4093/2012!

powers of constitutionality review during the financial crisis. Nevertheless, courts have reacted diversely to austerity policies and measures throughout the crisis period. While being more deferential during the spark of the crisis, they became much more activist later on.

Throughout the crisis period, spanning over eight years, austerity case law has in fact been rather diverse and asymmetric (Tsiftoglou and Koutnatzis 2017). That could certainly be attributed to numerous factors. Firstly, to systemic factors, namely the fact that Greece lacks a constitutional court, unlike the majority of other European countries. Thus, due to its diffuse and incidental control system, constitutionality review of the austerity measures in different policy areas would be fragmented (Venizelos 2016), with some decisions even jeopardizing the long-term sustainability of programmes of fiscal adjustment. Secondly, the emergency factor has played out differently in judicial review, depending on the timing of the cases. If we attempted to draw a rough periodisation of crisis case law, particularly of the Council of State case law, we could distinguish two periods. A first one (spanning from 2010 and the first bailout programme to 2014- the year of the first 'activist' court decisions²⁰), where justices were highly alert of the predicament of financial collapse and passively sided with the legislator (Vlachopoulos 2014); and a second (post-2014 to present) more 'activist' one, when justices considered that the dangers of economic collapse had rather subsided and, to a large extent -though not completely- displayed greater activism (Simantiras 2018). Thirdly, the composition of the courts, particularly of the Council of State was influential. During the eight years of the crisis, the Council of State had six different presidents, each led by his own judicial philosophy, following a different jurisprudential approach and lines.

The phenomenon of asymmetries could help describe Greek crisis case-law overall. The incidental review of constitutionality, together with the timing of the cases, the different presidencies of the courts, the nature of the disputes (tax or social policy measures, special²¹ or regular payroll cuts etc.) contributed to the creation of jurisprudence where the Council of State, in particular, took various stances. At times it affirmed triumphantly the constitutionality of certain measures, while at other times it annulled them, ignoring the fiscal effects of its decisions. Other times, conscious of such effects, it limited the effects of its decisions for the future²², not retroactively. On the long run, though, the Council of State developed a body of case law that approached the Memoranda realistically and responsibly, applying stricter scrutiny in the later stages of the crisis.

The very position of the courts, especially highest ones, has been a true balancing act during the crisis. On the one hand, justices were bound by the limits of judicial review. Thus, constitutionality review could not turn into a blunt challenge of austerity policies made by the democratically-elected legislator, or even a substitution of his choices (Koutnatzis 2005). Undoubtedly, courts lack both the legitimacy and the knowledge to

²⁰ See, eg, Council of State, Plenary Session Decisions 2192-96/2014 (concerning salary cuts in the armed forces), 4741/2014 (concerning salary cuts of university professors)

²¹ See, eg, Council of State, Decisions 2192-6/2014 (armed forces), 4741/2014 (university professors); 431/2018 (doctors in the public sector); Court of Audit, Decisions 4327/2014 and 1509/2016 (judges), 4707/2015 (armed forces), 7412/2015 (doctors), 1506/2016 (university professors).

²² See, eg, Council of State, Decisions 4741/2014 (professors) and 2287/2015 (pension cuts in the public sector)

make state budget decisions, even more so as demanded by the ‘constitutional law of a disorderly default’ (Venizelos 2016). On the other hand, while bound by the limits of constitutionality review and the exigencies of economic emergency, courts should perform a substantial review of austerity measures, particularly their justification (Iliopoulos-Strangas J. 2018). Such a check, as performed by the Council of State at the later stages of the crisis, has been rather novel and beneficial (Simantiras 2018). Procedure mattered, as much as substance, in legislating the measures, and severe austerity policies had to be properly justified. Furthermore, the emphasis on procedure *inter alia* signified the adoption of higher standards particularly in proportionality review, signifying a departure from the leniency of the past.

Different levels of scrutiny were applied by the Council of State during the crisis. Originally, in the first period (2010-2014), when the court was called to review austerity measures in the context of the first and partially the second bailout programmes, it exercised self-restraint. Economic emergency dictated full-scale compliance with austerity policies, primarily affecting social rights, but with respect to fundamental rights and principles like equality and proportionality. As soon as the MoUs were implemented into national law²³, litigation targeting austerity measures gave rise to a stream of crisis case law.

Two plenary decisions of the Council of State are emblematic of this first period²⁴. With its seminal ‘first MoU’ case (2012), concerning the constitutionality of the measures implementing the first MoU in the Greek legal order, the Court emphasised that the measures constituted part of a large-scale fiscal adjustment programme, imposed due to the emergency, subject only to marginal review. Hence it recognised a wide margin of discretion to the legislator, and ruled that there was no breach of the rights to property, equality or proportionality. The Council of State demonstrated remarkable self-restraint also in the famous PSI (Private Sector Involvement) cases (2014) concerning the compulsory exchange of Greek bonds with new – significantly devalued (‘haircut’) – ones, imposed against private sector bondholders, in the framework of radically reducing public debt. Property losses amounting up to 50% or more of capital were considered by the Court perfectly proportional, under the exceptional circumstances mandating their imposition. Furthermore, the Court ruled that, besides no property rights violation, there was no equality violation either, by the equal treatment of small bondholders and big investors.

In its second, more activist judicial period (2014-present), the Council of State has acquired a more proactive role when reviewing austerity measures. Four years after the spark of the crisis, the successive effect of austerity measures has led justices to conclude that the political branches had overstepped their boundaries with regard to measures targeting state expenditures like salary and pension cuts and intensified their review. However, such activism was directed almost exclusively toward state

²³ See in particular Law 3845/2010 implementing the first MoU (2010), and Laws 4046 and 4093/2012 implementing the second MoU (2012), imposing large-scale salary and pension cuts in the public sector.

²⁴ Council of State, Decisions 668/2012 (‘the first MoU case’) and 1116-1117/2014 (‘the PSI cases’)

expenditures, leaving intact tax measures²⁵ throughout the crisis period, intervening solely on peripheral²⁶ issues. This approach was untenable on constitutional grounds however. Proportionality review should have been applied equally to both kinds of austerity measures and across different special payrolls in the public sector, but with respect to their constitutionally assigned roles.

In proportionality review, the very notion and application of ‘fiscal public interest’ has been transformed during the crisis. In the first years of the crisis, courts – particularly the Council of State and the Special High Court – have regularly utilised it in creative ways²⁷ so as to legitimise excessive measures, inter alia restrictions on social rights (Pavlopoulos 2014). Fiscal consolidation and the immediate aversion of financial collapse often constituted a ‘major national interest’ that justified serious human rights interferences²⁸. Nevertheless, when courts became intensified their review later on, they were rather reluctant to use this legal term in order to justify disproportionate restrictions on social and other rights²⁹.

In one of the most activist decisions of its later period that concerned pension cuts in the public sector³⁰, the Council of State held that such successive cuts were unconstitutional. Particularly, the Court gave emphasis both to the timing of the measures, which were imposed after the imminent danger of financial collapse had, in the Court’s view, subsided, as well as primarily to the proper justification of the measures. The Court considered that due to their intensity such successive measures ought to have been justified by a thorough actuarial report attached to the body of the bill, to aid justices in proportionality review. Similar reasoning can be found also in a recent case concerning the abolition of certain allowances in the public sector³¹, as well as in lower court decisions on pension cuts³².

By comparison, the Portuguese crisis case-law might be exemplary. Throughout the financial crisis, the Portuguese Constitutional Court has also exhibited intense activism and less lenient standards of review overall (Guerra-Martins 2015; Kilpatrick 2017) when reviewing the austerity measures during the Portuguese bailout period, attracting harsh criticism for its decisions. While recognizing a wide discretion to the legislator in times of crisis, the Court applied strict scrutiny by relying on basic constitutional principles, namely equality or legal certainty, rather than social rights (Canotilho, Violante and

²⁵ See, eg, Council of State, Decisions 1972/2012 and 532/2015 (property tax), 2527/2013 (annual contribution imposed on the self-employed and professionals), 2563/2015 (special solidarity contribution for high incomes)

²⁶ See, eg, Council of State, Decisions 4003/2014 and 4446/2015 (real estate price adjustments)

²⁷ For example, Special High Court, Decision 25/2012, §10 (‘the need to protect fiscal balance...’), Council of State, Decision 668/2012, §35 (‘...the measures aim to cover the immediate financial needs of the country and to restore the future fiscal and financial situation, meaning targets that constitute serious purposes of public interest and, at the same time, purposes of mutual interest to the Eurozone states’).

²⁸ See, eg, Council of State, Decisions 693/2011 and 1620/2011

²⁹ See, eg, Council of State, Decisions 2307/2014 and 2192/2014

³⁰ Council of State (Plenary Session), Decision 2287/2015, particularly §§ 7, 24

³¹ Council of State (6th Section), Decision 2526/2018 (plenary decision pending)

³² See, eg, ΜονΔιοικΠρωτΘεσ 3037/2018 and ΜονΔιοικΠρΑθ 9117/2018

Lanceiro 2015)³³. In this way, it surpassed several obstacles inherent in their judicial protection -like state budgetary constraints- during the crisis and pronounced several norms unconstitutional. Furthermore, this strategy has helped to accommodate both critics and conflicting judges' views and to develop a more coherent 'crisis jurisprudence' overall (Guerra-Martins 2015).

Meanwhile, in Greece the issue of judicial salaries has been a controversial one during the crisis. Over the years, the judiciary had gradually become a 'state within a state' through the expansive interpretation of judicial guarantees of personal and functional independence³⁴. Through a series of decisions issued by a special court ('μισθοδικείο')³⁵ the judges have managed, even during the crisis, to keep their salaries to pre-crisis levels³⁶. Based on the premise that judges enjoy a special – preferential – status and, thus, salary/pension treatment, even among other special payrolls in the public sector, they have successfully challenged the constitutionality of all their salary and pension reductions, including retroactive ones. Moreover, compared to their foreign -like Cypriot³⁷- counterparts, that had faced similar challenges due to the financial crisis, Greek justices essentially overstepped their role: while declaring the unconstitutionality of their pay and salary cuts, including retroactive ones, the Special Court further mandated that judicial salaries returned to pre-crisis levels, while denying any substitution of the legislator³⁸. Nevertheless, justices had managed to successively raise their salaries over the years through creative constitutional interpretation³⁹. Interestingly, the Greek constitution per se does not mandate a specific salary or pension level for judges. Hence any cuts that respected the principle of proportionality should have been pronounced as constitutional. Besides, successive austerity measures were applied horizontally across the public sector, including all special payrolls enjoying special salary treatment under the constitution as well. Judicial review of these measures should have been subject only to marginal review⁴⁰.

While such judicial asymmetries were dominant throughout the crisis period in Greece, the so-called crisis litigation at supranational courts turned out rather unsuccessful. Both

³³ See, eg, Portuguese Constitutional Court Decisions 396/2011 (State Budget 2011), 353/2012 (State Budget 2012), 187/2013 (State Budget 2013), 862/2013 (Pension Convergence), 574/2014 (Pay Cuts 2014 - 18)

³⁴ Enshrined particularly in articles 87§1 and 88§2, in combination with article 26 of the Greek Constitution
³⁵ According to the combination of articles 88.2 and 99 of the Greek Constitution, a Special Court ('μισθοδικείο'), composed equally by 3 judges, 3 law professors and 3 senior attorneys, is competent to decide on all matters related to the remuneration and pensions of judges, provided that the resolution of the relevant legal issues may affect the salary, pension or fiscal status of a wider circle of persons.

³⁶ Special Court ('Μισθοδικείο'), see Decisions 88/2013, 127/2016 and 1/2018. See also Court of Audit, Decision 4327/2014 (Plenary Session) ruling that pension cuts imposed on judges were contrary to the principles of equality (4), proportionality (25) and the right to property (1 First Protocol ECHR).

³⁷ See High Court of Cyprus, *Fylaktou v. Democracy of Cyprus*, Case No 397/12, Judgment of June 14, 2013, which ruled that pay and salary cuts of Cypriot justices were unconstitutional. Interestingly, judges took the initiative to voluntarily have their pay cut during the three years of the Cypriot crisis (2013-16).

³⁸ Despite a minority of the court suggesting otherwise, convincingly enough. See the minority opinion of Professor P.Spyropoulos in Decision 88/2013, claiming correctly that only the legislator, not the courts, can modify judicial salaries through legislation, always bound by constitutional principles.

³⁹ See the minority opinion of Professors N.Alivizatos and I.Konidaris in Decision 127/2016

⁴⁰ See especially the minority opinion of Justice I.Sarmas in Court of Audit Decision 4327/2014, as well as the minority opinion of Vice-President A.Rantos et al in Council of State Decision 4741/2014, §24.

the European Court of Human Rights⁴¹ and the Court of Justice of the EU (CJEU)⁴² have recognised a wide margin of appreciation or discretion to national authorities in the crisis and have either deferred to them or declined to review austerity measures altogether. Breach of property right claims have been particularly unsuccessful, in the context of salary and pension cuts, due to the fact that the Strasbourg Court does not recognise a right to 'sufficient' salary or pension of established subsistence level. In fact, the legislator is free to adjust salaries and pensions as fit as long as he respects the principle of proportionality. However, this wide judicial deference, exercised particularly by the Strasbourg Court in the context of fiscal and social policy, cannot be legally justified (Iliopoulos-Strangas J. 2018), when compared to other policy areas when the Court has certainly been more activist. Moreover, such mainstream judicial deference has been a rather typical trend throughout the Euro crisis, signaling a deficit of judicial review particularly of the acts of EU institutions in the framework of financial assistance programmes (Tuori and Tuori 2014; Hinarejos 2015). The very applicability of the EU Charter of Fundamental Rights has been questioned during the Euro crisis (Iliopoulos-Strangas J. 2018; Poulou 2017), with domestic – particularly Greek and Portuguese – courts systematically avoiding any 'undesired EU judicialisation of the conflict' (Kilpatrick 2017) between the MoUs and fundamental rights during the Euro crisis. National -rather than international- human rights standards, thus, finally prevailed. Ultimately, national rather than supranational judicialisation had an impact on these cases.

4.3 The People: Democratic Fallacies and Populist Constitutionalism

The Euro crisis period in Greece, as in several other European countries, saw the quick rise of populism and its constitutional equivalent, populist constitutionalism. Essentially, populism is the 'negation of constitutional and representative democracy' (Blokker 2017; Venizelos 2018). It is the rejection of constitutional order, as we know it, of state institutions and the rule of law. Populists tend to self-construct the 'people' and their will -as well as their 'enemies'- and to claim it as exclusively their own (Müller 2016; Sotiropoulos 2018). Constitutionalism is treated by populists over-critically or in a rather opportunistic manner (Blokker 2017). Frequently, they curb established democratic processes and institutions as tactics and tools to serve their own agenda. As pointed out (Müller 2016), such seemingly democratic engagements, may turn out not to be 'a path to more political participation'.

In this framework, the Greek people per se have been tested as drivers of change during the crisis through general elections, a referendum and the process of constitutional revision. Regarding elections, the double general elections of 2012 and particularly of 2015 signified a major political backlash against the establishment, with the collapse of

⁴¹ ECHR, *Koufaki & ADEDY v Greece*, App.No 57665/12, Judgment of May 7, 2013 (concerning salary cuts in the public sector), ECHR, *Mamatas et al v Greece*, App.No 63066/14, Judgment of July 21, 2016 (concerning the Private Sector Involvement 'PSI'- Greek debt haircut - property damages suffered by bondholders)

⁴² General Court of the EU, T-541/10 *ADEDY v Commission & Council*, ECLI:EU:T:2012:626, and Case T-215/11 *ADEDY v Commission & Council*, Judgments of November 27, 2012, ECLI:EU:T:2012:627

long-held bipartisanism and the emergence of a left-led coalition to get the country out of the crisis⁴³.

Such major political change was quite unique in several aspects. Firstly, it did not happen in any other crisis-hit country in the Euro periphery, where respective governments - with the prime examples of Portugal and Cyprus - took ownership of the bailout programmes and moved forward. On the contrary, in Greece there was lack of an initial public consensus over crisis management and a wide rejection of austerity from the very start. Moreover, general election results were not truly representative of the Greek electorate. In fact, there has been a drastic decline in voter turnout in elections during the crisis, indicating a relative backsliding of democracy in Greece (Sotiropoulos 2018). Lastly, this major political change, defying promises, did not signify an end to austerity in Greece. On the contrary, austerity has been successively adopted by every single government since 2010. Political realism drastically led to a reconfiguration of even radical anti-austerity narratives of the past.

The July 2015 referendum was a turning point in this regard. In late June 2015, and only a few months into the newly elected SYRIZA/ANEL government, critical negotiations with Greece's creditors broke and Prime Minister Alexis Tsipras decided, to everyone's surprise, to call a referendum. Proclaimed as a 'negotiating tool' against the creditors' 'ultimatum'⁴⁴, this controversial referendum called the Greek people to decide about the next steps ahead. On the verge of the country's collapse, this referendum really crossed the boundaries.

It was a perilous move, one that disregarded history, culture and certainly the legal standards of referenda in Greece. Compared to other European countries, modern Greece certainly lacks both the history and a culture of referenda. Ever since the fall of the military dictatorship in 1974 and the establishment of the modern democracy, the political class had been reluctant to resort to direct democracy⁴⁵, even more so in times of financial crisis⁴⁶. Given its timing, procedure and context, this 'bailout referendum' marginally complied with the law or logic (Tsiliotis 2015; Contiades and Fotiadou 2016). Announced only a week in advance, this referendum deprived people of any significant time for reflection and debate. Moreover, it was drafted in the least comprehensible manner with a vague, bizarre and misleading question addressed to the average voter, while it was premised on a troika proposal that was taken back within hours.

⁴³ For the June 2012, the January 2015 and the September 2015 Greek general elections results see https://en.wikipedia.org/wiki/June_2012_Greek_legislative_election, https://en.wikipedia.org/wiki/January_2015_Greek_legislative_election and https://en.wikipedia.org/wiki/September_2015_Greek_legislative_election

⁴⁴ Greek PM Alexis Tsipras Calls Referendum on Bailout Terms, *The Guardian*, June 26, 2015

⁴⁵ The only other referendum of this modern era was the referendum on retaining the republic (Greek Republic Referendum) held in 1974, after the fall of the military regime, where the electorate voted categorically (almost 70%) in favor. See https://en.wikipedia.org/wiki/Greek_republic_referendum,_1974

⁴⁶ In October 2011, former PM George Papandreou's idea to call a referendum on the terms of Greek debt haircut was met with outrage within and outside of Greece, leading up to his resignation.

Nevertheless, despite its serious legal misgivings, this referendum call was given the green light by the Council of State, as expected⁴⁷.

Besides, the July 2015 referendum was very risky. Under the looming fear of Grexit, the government was gambling with the creditors, shifting all the responsibility to its people. Ironically, instead of giving voice to the Greek people, this last-minute referendum turned into a political manipulation tool. It was a populist tactic, and a rather dangerous one, curbing a democratic process to advance the government's agenda (Müller 2016). In a defining moment for Greece, PM Tsipras opted for the 'non-solution of the Greferendum' (Mudde 2017). While publicised as 'a vote against austerity' or 'the troika establishment', the 2015 referendum turned out to mislead people and to define the democratic paradox in the harshest way possible. When a state is on the verge of financial collapse, and it has failed to find any credible alternatives, democracy may be working only by name.

The promise of 'an end to austerity' evaporated fast. Only a week after the referendum, under a frenzied bank run and capital controls, and despite the vast majority voting for 'no'⁴⁸, Tsipras defied this popular mandate and accepted a new, far stricter bailout deal with the creditors⁴⁹. Such a wild U-turn, particularly given the PM's record of criticism of his predecessors' bailout negotiations, resulted into a big compromise. To everyone's surprise, the new agreement, when trust had been lost totally with the Troika, entailed even harsher conditionality than the former programmes, in exchange for an €86 billion bailout (Blustein 2016). Moreover, it provided the establishment of an ultra-privatisation fund, aimed to generate a total of €50 billion over the course of the next decades through the monetisation of all public assets, only a small portion of which would be used for public investments, and more than half to finance the sovereign debt and recapitalise banks⁵⁰.

In addition to the 2015 bailout referendum, the result of which was brazenly defied, more populist initiatives have come up, in the context of the constitutional revision process. In early 2017, the present government launched a 'social dialogue' by appointing a crowdsourcing committee⁵¹ composed almost exclusively by non-constitutional law experts. Essentially, the committee's mission was to grasp popular attitudes about the present constitution and to generate proposals for its next revision. Despite any good intentions, this initiative rather circumvented the strict constitutional revision process (Venizelos 2018), which assigns the relevant initiative to the parliament alone⁵². The same goes for a former PM's idea to suggest a referendum on the matter

⁴⁷ Council of State (plenary session), Decision 2291/2015. Following its standard case-law, the Court held that governmental acts like the referendum call are considered political questions not subject to judicial review.

⁴⁸ In the July 6, 2015 'Greek Bailout' referendum, over 60% (61, 31%) voted 'no', while 38,7% voted 'yes'. See the full results, including turnout, at https://en.wikipedia.org/wiki/Greek_bailout_referendum,_2015

⁴⁹ Euro Summit Statement, Brussels, July 12, 2015 available at <http://www.consilium.europa.eu/en/>

⁵⁰ See Euro Summit Statement, id, outlining the third bailout deal, after exhausting negotiations.

⁵¹ For its mission, composition and activities see <http://www.syntagma-dialogos.gov.gr/> (in Greek only)

⁵² Article 110 of the Greek Constitution. Inter alia, this provision prescribes qualified majorities and time limits.

of constitutional revision (Pavlopoulos 2011)⁵³. Notwithstanding the allure of direct popular engagement with the emblematic process of constitutional revision, the people were driven to circumvent the constitution. Moreover, the commencement of the constitutional revision process in this particular timing, the 2019 election year, where political tensions and polarisation are evident and the essential political consensus is absent, further attests to the true intentions of its architects. Much like the bailout referendum, the symbolic process of constitutional revision, with the expedient manner and the scale it has been recently initiated, has been used as yet another populist tactic ahead of the next general election.

5. Conclusion

After nearly a decade of bailouts, Three Memoranda and a major political change signifying a backlash to the old establishment, an exodus from the crisis remains unseen. The Memoranda themselves, despite their high ambitions, have not lived up to all their promises, each for different reasons. One could blame reform incapacity -a historical scourge of the Greek public administration (Dertilis 2018) as well as the unrealistic troika targets with the implementation of shock tactics rather unsuited to Greece (Simitis 2017). On the one hand, the adjustment programmes were applied to the Greek public administration which, despite numerous reform efforts, still remains weak (Ioannidis and Koutnatzis 2017). On the other hand, the political class, regardless of the ruling party, has not substantially owned the programmes it implemented, always calculating the political cost. Meanwhile, the prevailing narrative against the Memoranda has gradually paralyzed the Greek society. Nevertheless, political change in Greece, however major and unique it may have been compared to other Euro crisis-hit states, did not signify any radical departure from the past. On the contrary, austerity policies were implemented by all successive crisis governments.

The crisis narrative *per se*, prevalent in popular discourse and constitutional politics alike, has worked both ways. On the one hand, it has served to legitimise policies, legislation, and executive acts -in general, derogations from well-established norms-that would have been untenable on constitutional grounds. New norms have emerged, while older practices predating the crisis have been intensified and normalised in parliamentary review, that have gradually transformed the Parliament as an institution. However, such constitutional deregulation trends have spread also in other states during the Euro crisis, challenging the very normative power of constitutions (Yannakopoulos 2017).

Courts, on the other hand, have responded rather asymmetrically to the crisis narrative. Judicial self-restraint has been instrumental, both on national and particularly on supranational levels, for the Euro crisis management. Nevertheless, while national

⁵³Article 44.2 of the Greek Constitution provides only two types of referenda: a) a referendum on crucial *national* matters and b) a referendum on Bills passed by Parliament regulating important *social* matters, with the exception of the fiscal ones. Neither type can be used to revise the constitution, since constitutional revision is a process performed under the strict conditions enshrined in article 110 of the Greek Constitution.

courts displayed deference in the spark of the financial crisis, judicial scrutiny of austerity measures significantly intensified later on, notably targeting the justification of the measures. However, this shift was rather asymmetric, given the particulars of the system of constitutionality review in Greece, the nature of the cases, or the composition of the courts. Bound by their institutional limits, and aware of the fiscal impact of their decisions, some courts limited the effects of their annulling decisions, while others didn't. Moreover, following other national high courts during the Euro crisis, the Council of State refrained to acknowledge any EU law links – and, therefore, any EU judicialisation of its matters- when reviewing the bailout measures. National human rights standards have thus prevailed in judicial review, as the crisis factor gradually deteriorated in judicial reasoning.

Overall, the Greek crisis has gradually given rise to a new constitutional ethos, in the sense that the very perception of the constitution and its value among people has changed (Contiades and Tassopoulos 2013a). Clearly, this new ethos radiates well within the whole spectrum of civic life in Greece: from judicial interpretation to law enforcement, from regulation to the referenda and elections. *The new constitutional ethos permeates and, thus, seriously undermines democracy*, since it challenges the very normativity of the constitution. Moreover, the crisis has generated *an era of populist constitutionalism* that has poisoned constitutional politics, values and state institutions. Populist governments have steadily abused democratic processes and the constitution as a partisan instrument to promote their own agenda. Means of direct democracy like the referendum have been expediently used, only to be defied in the 11th hour of Grexit, while the rigid process of constitutional revision has been recently initiated in a manner and a timing that challenges its very symbolism.

Finally, the Greek crisis, when viewed under the prism of the Euro crisis, has brought to light a hard 'trilemma': how to combine democracy with compliance and capability, all at the same time (Featherstone 2016; Eleftheriades 2014). Greece became another victim of the illnesses of a fundamentally-flawed monetary union that has hampered EU political unity and undermined European democracy, defying its founding founders' aspirations. Catastrophic sovereign debt management during the Euro crisis has resulted to serious erosions of democracy. In the midst of collective problems that call for collective action, sovereignty needs to be re-conceptualised (Loughlin 2016). The Euro crisis has particularly highlighted this need, in the context of deeper European integration and risk management. Sovereignty, in the context of global challenges, only becomes a relative concept.

The constitution as a legal and political instrument is vital for any democracy. A new 'constitutional patriotism' (Venizelos 2018) is needed, meaning a new, reinvigorated relationship of citizens and state institutions with the Greek constitution. Furthermore, while the crisis deepens and emergency starts to fade, constitutional resilience is key. Restoring checks and balances, while protecting the sovereign from further erosions becomes a task and a challenge to protect Greece from a total state transformation.

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